Supreme Court, U.S.
FILED

No. 09- 09 - 949 FEB 9 - 2010

OFFICE OF THE CLERK
William K. Suter, Clerk

IN THE

Supreme Court of the United States

JOYCE K. MATSUO, SHARON WARREN, RONALD FRANKLIN, FRANK HARDT, RUSSELL HOLLAND, ROY MATSUO, MICHAEL MCCRARY, FRED NOLKE, CHARLES ROBERTS, RONALD SCHERLER, ROMAN BUYSON, PETER NEWMAN, THOMAS WARREN, JOHN J. KATO, AND MICHAEL C. SHEARER, on behalf of themselves and others similarly situated,

Petitioners,

v.

THE UNITED STATES, and the DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

GREGORY K. MCGILLIVARY
Counsel of Record
WOODLEY & MCGILLIVARY
1101 Vermont Avenue, NW
Suite 1000
Washington, DC 20005
(202) 833-8855

February 9, 2010

WILSON-EPES PRINTING CO., INC – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTIONS PRESENTED

This case presents the important question of whether Congress may deny a significant benefit to a discrete class of individuals for no reason other than the identity of the state in which they reside. By enacting the Federal Employees' Pay Comparability Act of 1990, Congress provided locality-based comparability pay to Federal employees to reduce, and eventually eliminate, disparities between public and private sector compensation for employees performing similar work. This statute, however, excludes Federal employees who reside in Alaska and Hawaii from entitlement to locality pay solely and explicitly because of the identity of their state of residence. Congress provided no explanation or justification for this exclusion. Because locality pay is a significant benefit, and because it is incorporated into the salary used to calculate Federal employees' retirement benefits, the exclusion of Federal employees who reside in Alaska and Hawaii materially affects their right to travel among the fifty states by penalizing those who move to, and reside in, those two states, and by deterring others from moving to these states.

The questions presented here are:

1. Whether an Act of Congress that interferes with Petitioners' right to travel among the fifty states by penalizing Federal employees solely and explicitly because of the identity of the state in which they reside—*i.e.*, Alaska or Hawaii—is insulated from strict scrutiny or some higher level of review than rational basis merely because it imposes the same penalty upon all Federal employees within those two states where the Act does not similarly penalize Federal employees who reside in the other forty-eight states,

and where this Court has held that Federal laws interfering with the Constitutional right to travel are subject to a higher level of scrutiny.

2. Whether an Act of Congress that excludes individuals from entitlement to a significant benefit for no reason other than that they reside in a particular state violates their Constitutional right to Equal Protection under the laws, where Congress has provided no justification, compelling or otherwise, for their exclusion.

LIST OF PARTIES

Petitioners are Joyce K. Matsuo, Sharon Warren, Ronald Franklin, Frank Hardt, Russell Holland, Roy Matsuo, Michael McCrary, Fred Nolke, Charles Roberts, Ronald Scherler, Roman Buyson, Peter Newman, Thomas Warren, John J. Kato, and Michael C. Shearer, on behalf of themselves and others similarly situated.

Respondents are the United States of America and the Director of the Office of Personnel Management.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	iii
TABLE OF AUTHORITIES	vii
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED	2
STATEMENT	2
I. THE RIGHT TO TRAVEL	2
II. THE FEDERAL EMPLOYEES' PAY COMPARABILITY ACT	5
III. THE DISTRICT COURT'S DECISION	7
IV. APPEAL TO THE NINTH CIRCUIT	11
REASONS FOR GRANTING THE PETITION	12
I. THE PROTECTION AFFORDED TO FEDERAL CITIZENS BY THE CITIZENSHIP CLAUSE IS A FUNDAMENTAL RIGHT THAT MUST BE REAFFIRMED BY THIS COURT	12
II. FEPCA'S EXCLUSION OF FEDERAL CITIZENS FROM A SIGNIFICANT BENEFIT SOLELY BECAUSE THEY RESIDE IN A PARTICULAR STATE VIOLATES PETITIONERS' CONSTITUTIONAL RIGHT TO TRAVEL	16

TABLE OF CONTENTS—Continued

Page

III. FEPCA'S EXCLUSION OF FEDERAL EMPLOYEES FROM A SIGNIFICANT BENEFIT SOLELY BECAUSE THEY RESIDE IN PARTICULAR STATES VIOLATES PETITIONERS' CONSTITUTIONAL RIGHT TO EQUAL PROTECTION UNDER THE LAWS 21

CONCLUSION 25

APPENDIX

APPENDIX A 1a

APPENDIX B 30a

APPENDIX C 58a

APPENDIX D 67a

TABLE OF AUTHORITIES

CASES

Page

Aloha Airlines v. Dir. of Taxation of Hawaii, 464 U.S. 7 (1983) 17
Aptheker v. Sec'y of State, 378 U.S. 500 (1964)..... 4
Attorney Gen. of New York v. Soto-Lopez, 476 U.S. 898 (1986)..... 3
Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1935)..... 16
Califano v. Torres, 435 U.S. 1 (1978)...9, 17, 18, 19
Evansville-Vanderburgh Airport Auth. v. Delta Airlines, 405 U.S. 707 (1972)..... 17, 18
Examining Board v. Flores de Otero, 426 U.S. 572 (1976)..... 19
Harris v. Rosario, 446 U.S. 651 (1980)..... 19
Heller v. Doe, 509 U.S. 312 (1993) 23
Hooper v. Bernalillo County Assessor, 472 U.S. 612 (1985)..... 23
Kent v. Dulles, 357 U.S. 116 (1958) 4
Miss. Univ. for Women v. Hogan, 458 U.S. 718 (1982)..... 3, 4
Passenger Cases, 7 How. 283 (1849)..... 16
Saenz v. Roe, 526 U.S. 489 (1999).....*passim*
Shapiro v. Thompson, 394 U.S. 618 (1960) .2, 4, 16
United States v. Guest, 383 U.S. 745 (1966) .. 16
Williams v. Rhodes, 393 U.S. 23 (1968) 3
Zobel v. Williams, 457 U.S. 55 (1982)..... 3, 24

CONSTITUTIONAL, STATUTORY AND LEGISLATIVE MATERIALS

U.S. CONST. art. I, sec. 8, cl 3.....*passim*
U.S. CONST. art. IV, sec. 2, cl 1 3
U.S. CONST. Amend. 5 ..... 4, 7-8, 21
U.S. CONST. Amend. 14, Sec. 1 .....3, 4, 16

TABLE OF AUTHORITIES—Continued

	Page
5 U.S.C. § 5301	5, 24
5 U.S.C. § 5304	5, 6
5 U.S.C. § 5701(6)	5
5 U.S.C. § 8331	6
5 U.S.C. § 8339	6
28 U.S.C. § 1254(1)	2
5 C.F.R. § 531.603	6
5 C.F.R. § 531.604	6
Exec. Order No. 13,420, 71 Fed. Reg. 77,571, 77,580 (Dec. 26, 2006)	7
SECONDARY AUTHORITIES	
Laurence H. Tribe, "*Saenz Sans Prophecy: Does the Privileges and Immunities Revival Portent the Future—or Reveal the Structure of the Present?*," 113 HARV. L. REV. 110 (1999)	4
MISCELLANEOUS	
Brief of Appellants at 22	22
Reply Brief of Appellants at 2	22

IN THE

Supreme Court of the United States

No. 09-___

JOYCE K. MATSUO, SHARON WARREN, RONALD FRANKLIN, FRANK HARDT, RUSSELL HOLLAND, ROY MATSUO, MICHAEL MCCRARY, FRED NOLKE, CHARLES ROBERTS, RONALD SCHERLER, ROMAN BUYSON, PETER NEWMAN, THOMAS WARREN, JOHN J. KATO, AND MICHAEL C. SHEARER, on behalf of themselves and others similarly situated,

Petitioners,

v.

THE UNITED STATES, and the DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit, reported at 586 F.3d 1180, is reprinted in the Appendix ("App.") at 58a. The decisions of the United States District Court for the District of Hawaii, reported at 416 F.Supp.2d 982

and 532 F.Supp.2d 1238, are reprinted in the Appendix at 1a and 30a.

JURISDICTION

The Court of Appeals judgment was entered on November 12, 2009. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

Pertinent Constitutional, statutory and regulatory provisions are reproduced in the Appendix, beginning at 67a.

STATEMENT

This case involves an important issue of first impression: whether Congress is prohibited by the Constitution from depriving certain United States citizens of a significant benefit or privilege based solely and explicitly on the identity of the state in which they reside, where it has been established that the Congressional statute at issue materially affects their right to travel among the fifty states, and where Congress has not provided any explanation or justification for the exclusion.

I. THE RIGHT TO TRAVEL

This Court has long recognized that all citizens should be free to travel among the states "uninhibited by states, rules, or regulations which unreasonably burden or restrict this movement." *Shapiro v. Thompson*, 394 U.S. 618, 629 (1960). Indeed, this Court has held that this right is "so important" that it is "a virtually unconditional personal right, guaranteed by the Constitution to us all." *Saenz v. Roe*, 526 U.S. 489, 495 (1999).

The "textual source of the constitutional right to travel . . . has proved elusive." *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, 902 (1986). The origin of the right has been assigned to the Privileges and Immunities Clause of Art. IV, to the Commerce Clause, and to the Privileges and Immunities Clause of the Fourteenth Amendment. *Id.* It has also been noted that the right to travel "achieves its most forceful expression in the context of equal protection analysis." *Zobel v. Williams*, 457 U.S. 55, 67 (1982) (Brennan, J., concurring).

Regardless of its source, the right to travel must be respected by both the states and by Congress when enacting legislation. In *Saenz*, this Court struck down a Federal statute authorizing the California welfare system's reliance on length of residency in determining benefit levels, stating that "the protection afforded to the citizen by the Citizenship Clause of [the Fourteenth] Amendment is a limitation on the powers of the National Government as well as the States." *Saenz*, 526 U.S. at 507-08. As this Court succinctly stated:

> Article I of the Constitution grants Congress broad power to legislate in certain areas. Those legislative powers are, however, limited not only by the scope of the Framers' affirmative delegation, but also by the principle 'that they may not be exercised in a way that violates other specific provisions of the Constitution.' . . . *Williams v. Rhodes*, 393 U.S. 23, 29 (1968). . . . 'Although we give deference to congressional decisions and classifications, neither Congress nor a State can validate a law that denies the rights guaranteed by the Fourteenth Amendment.'. . . . *Mississippi*

Univ. for Women v. Hogan, 458 U.S. 718, 732-33 (1982).

Id. at 508 (some internal citations omitted); *see also Kent v. Dulles*, 357 U.S. 116, 125-27 (1958); *Aptheker v. Secretary of State*, 378 U.S. 500, 505-06 (1964). Thus, just as the Fourteenth Amendment's guarantee of equal protection under State law has been incorporated against the Federal government through the Fifth Amendment Due Process Clause, so its protection against State discrimination based on State of residency is incorporated against the Federal government.[1]

A law violates the Constitutional right to interstate travel when it "actually deters such travel" or when it uses "any classification which serves to penalize the exercise of that right." *Soto-Lopez*, 476 U.S. at 903. A classification that has "the effect of imposing a penalty on the exercise of the right to travel violates the Equal Protection Clause 'unless shown to be necessary to promote a compelling governmental interest.'" *Saenz*, 526 U.S. at 499 (quoting *Shapiro*, 394 U.S. at 634); *see also Soto-Lopez*, 476 U.S. at 904 n.4 ("Of course, regardless of the label we place on our analysis—the right to migrate or equal protection—

---

[1] Professor Laurence Tribe has reached the same conclusion, stating: "it was important to the *Saenz* court to add that 'the protection afforded to the citizen by the Citizenship Clause of the [Fourteenth] Amendment is a limitation on the powers of the National Government as well as the States'" because, "[u]nless that congressional measure violated some right protected by the Constitution from abridgement by Congress, or some structural principle binding on Congress, it would necessarily validate what California had done." Laurence H. Tribe, "*Saenz Sans Prophecy: Does the Privileges and Immunities Revival Portent the Future—or Reveal the Structure of the Present?*," 113 Harv. L. Rev. 110, 128 (1999).

once we find a burden on the right to migrate the standard of review is the same. Laws which burden that right must be necessary to further a compelling state interest.").

II. THE FEDERAL EMPLOYEES' PAY COMPARABILITY ACT

Congress enacted the Federal Employees' Pay Comparability Act ("FEPCA" or "the Act") in 1990, and the Act was implemented in 1994. The Congressional policies behind the Act are to ensure that Federal employees receive "equal pay for substantially equal work within each local pay area"; to ensure that Federal employees' pay is "comparable with non-Federal pay rates for the same levels of work"; and to "completely" eliminate any "existing pay disparities between Federal and non-Federal employees." 5 U.S.C. §§ 5301, 5304(a)(3).

FEPCA provides a mechanism for adjusting the annual pay of most Federal employees so that it more closely approximates the pay received by private sector employees who perform comparable work. The Act accomplishes this by requiring that comparability payments "shall be payable within each locality determined to have a pay disparity greater than 5 percent." *Id.* § 5304(a)(1). The Act provides, however, that Federal employees "outside the continental United States, as defined in section 5701(6)," are not to be included in a pay locality. *Id.* § 5304(f)(1)(A). Section 5701(6), in turn, defines the continental United States as "the several States and the District of Columbia, but does not include Alaska or Hawaii." *Nothing* in the statute or its legislative history explains why Alaska and Hawaii are explicitly excluded from the locality pay program.

Comparability payments under FEPCA are "considered to be part of basic pay for purposes of retirement." *Id.* § 5304(c)(2)(A). Federal employees' retirement benefits are based, in large part, on the average of their three highest consecutive years' basic pay. Because locality pay is a significant salary benefit, and because it is incorporated into the salary used to calculate overtime pay and thrift savings retirement benefits, including government matching of funds for retirement benefits, it enhances Federal employees' retirement benefits as well as their annual income. *Id.* §§ 8331(4) & 8339. The exclusion of Federal employees who reside in Alaska and Hawaii from receipt of this benefit materially affects their right to travel among the fifty states by penalizing those who move to and reside in those two states, and by deterring others from moving to these states.

Locality pay for Federal employees covered by the statute is determined annually by comparing the General Schedule pay rates for Federal employees with the pay rates of non-Federal employees performing the same type of work within a pay locality. *Id.* § 5304(d)(1). This comparison is based on surveys conducted by the Bureau of Labor Statistics ("BLS"). *Id.* There are currently 32 locality payment areas for which comparability payment levels have been established. 5 C.F.R. §§ 531.603 & 531.604. All but one of these are specific areas of the United States, and the 32nd is designated as the "Rest of U.S." ("RUS") and consists of those portions of the "continental United States" that do not fall within any of the other 31 locality pay areas. *Id.*[2] In 2007, the comparability payment level for RUS was 12.64

[2] Of course, the phrase "Rest of U.S." is a misnomer because Hawaii and Alaska are excluded.

percent of base pay; the levels for the other 31 areas ranged from 13 percent for "Indianapolis-Anderson-Columbus, Indiana" to 30.33 percent for "San Jose-San Francisco-Oakland, California." Exec. Order No. 13,420, 71 Fed. Reg. 77,571, 77,580 (Dec. 26, 2006).

Federal workers in the RUS received locality pay in 2007 even though BLS had not surveyed all of the areas included within that payment area. As a result, *every single Federal employee in the 48 states* received locality pay paid, at a minimum, at the RUS rate. In contrast, Federal employees in Alaska and Hawaii who work in the same or similar job classifications at the identical GS level of base pay, with identical job titles and performing *identical* work, received *no* locality pay.

III. THE DISTRICT COURT'S DECISION

The instant case was filed in the United States District Court for the District of Hawaii by Federal employees who work, or formerly worked, in Alaska or Hawaii and who as a result do not, or did not, receive locality pay. Two classes of plaintiffs were certified by the District Court. The first consists of all Federal employees employed in the contiguous United States who receive locality pay and who cannot reside in Alaska or Hawaii without losing their locality pay. The second consists of all current or former Federal employees employed in Alaska or Hawaii who are ineligible to receive locality pay because they do not reside in the 48 states. App. 31a.

In their Complaint, the Petitioners alleged, *inter alia*, that FEPCA's exclusion of Federal employees living in Alaska and Hawaii constitutes an unconstitutional restriction in violation of the Equal Protection Clause of the Fifth Amendment to the United

States Constitution. *Id.* On January 30, 2008, the District Court issued a decision granting Respondents' motion for summary judgment.

The District Court found that, because "FEPCA on its face distinguishes between federal employees in Hawaii and Alaska and [continental United States] federal employees, and results in Hawaii and Alaska employees being treated differently in terms of not receiving locality pay with the attendant effects on retirement contributions and annuities," the Petitioners had demonstrated that FEPCA triggers equal protection review. *Id.* at 43a. Citing *Saenz*, 526 U.S. at 507-08, the court also agreed with the Petitioners that the fundamental right to travel "limits the national government's powers." App. at 45a ("it would be anomalous if the national government was prohibited from empowering the several states to interfere with the right to travel but it could impair the right itself directly."). Moreover, the court found that FEPCA's exclusion "has influenced federal employees' decisions about whether to move from these states to [the continental United States] to receive locality pay." *Id.* at 34a.

Notwithstanding the foregoing, the District Court concluded that Petitioners had not demonstrated that FEPCA implicated the right to travel "sufficiently to trigger strict scrutiny review." *Id.* at 46a. Specifically, it held that Petitioners' challenge to FEPCA did not fit within any of the three aspects of interstate travel recognized by this Court in *Saenz*, 526 U.S. at 500.[3] *Id.* It further concluded that, "[e]ven if the

---

[3] In *Saenz*, this Court, applying the Constitutional right to travel to a state, and not a federal, statute, held that the right embraces "at least three different components. It protects the right of a citizen of one State to enter and to leave another

right to travel's contours extend beyond these three components," *id.* at 47a, FEPCA did not offend this Constitutional right because it is not the act of traveling that triggers FEPCA's exclusion, and because this Court, in *Califano v. Torres*, 435 U.S. 1 (1978), "rejected the proposition that the right to interstate travel includes the right to receive the same level of benefits in the citizen's new state as the citizen enjoyed in the former state of residence." *Id.* at 48a.

The District Court therefore applied only a rational basis review to FEPCA. *Id.* at 50a. Significantly, in applying this analysis, the court rejected each of the Respondents' purported rationales for FEPCA's exclusion of Federal employees in Alaska and Hawaii. For instance, with respect to Respondents' argument that Congress "rationally could have decided Hawaii and Alaska employees did not need locality pay because they received tax-free COLAs," *id.* at 51a, the court conceded that it was "puzzled by the legislative anomaly that here operates to the lifelong disadvantage of federal employees in the excluded states," insofar as the statute "does not state that it will exclude from its coverage any pay locality eligible for COLA" but rather "it excludes Hawaii and Alaska by name." *Id.* at 52a.

The court also noted that, because Hawaii and Alaska federal employees have received COLA's "since the 1940s, long before FEPCA's enactment, due to increased living costs," and the COLA is aimed at ensuring that those employees have comparable

---

State, the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State, and, for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State." *Saenz*, 526 U.S. at 500.

buying power as Federal employees in Washington, D.C., the enactment of FEPCA "gives federal employees in Washington D.C. an additional supplement to base pay in the form of locality pay that it does not give to federal employees in Hawaii and Alaska." *Id.* at 52a-53a. The court found that this "historical context calls into question Defendants' argument that COLA is a tradeoff for FEPCA's locality pay." *Id.* at 53a.

The court also rejected the Respondents' other purported rationales for the exclusion, concluding that "federal employees' state of residence bears no rational relationship to excluding them from locality pay to conserve the public fisc," and that the Respondents had not "adequately explain[ed] what they mean in arguing Congress could have been motivated by 'legislative convenience' in the context of this case." *Id.* at 53a. Despite its rejection of the Respondents' purported rationales, the court concluded that Petitioners had not met their burden of overcoming the presumption that FEPCA was constitutional because "Congress has a legitimate interest in creating and managing compensation packages for its employees," and because Congress rationally could have decided employees who received COLA pay allowances did not also need to receive locality pay. *Id.* at 54a.

The District Court found this to be the case "even if it has turned out, in practice, that FEPCA's exclusion has worked to the disadvantage of Hawaii and Alaska employees with respect to their retirement benefits." *Id.* at 55a. It also found that Congress "may" have determined that locality pay was not needed in these states to recruit and retain employees. *Id.* at 56a. The court reached this conclusion despite its finding

that the "legislative history is silent as to why Congress chose to exclude Hawaii and Alaska employees from receiving locality pay," *id.* at 34a, and despite the lack of any evidence in the record demonstrating that such a determination was ever made. *Id.* at 56a.

IV. APPEAL TO THE NINTH CIRCUIT

In their appeal to the Ninth Circuit Court of Appeals, Petitioners argued that the District Court erred by mechanically applying the analysis in *Saenz,* which is designed for analyzing right-to-travel challenges to *state* statutes, to a *federal* law that discriminates against United States citizens solely because they reside in particular states. Petitioners also argued that the District Court erred under equal protection analysis by failing to apply a higher level of scrutiny than rational basis review to FEPCA's exclusion, which was unique in discriminating against residents of Hawaii and Alaska based solely on the identity of the state in which they reside.

On November 12, 2009, the Ninth Circuit affirmed the District Court's ruling. At the outset of its decision, the court held that Petitioners who are now working in Alaska and Hawaii lack standing to bring a right to travel claim because "the Act doesn't [sic] affect their 'freedom to leave' Alaska or Hawaii." *Id.* at 62a. The court did, however, agree with Petitioners that Federal employees who work in the forty-eight contiguous states would lose locality pay if they moved to Alaska or Hawaii and continued to work for the federal government, "so traveling would arguably trigger a penalty." *Id.* Nevertheless, the court concluded that these Petitioners had not demonstrated that FEPCA's exclusion burdened their fundamental right to travel.

In reaching this conclusion, the court applied the three-part test in *Saenz*, and concluded that because "the states aren't [sic] involved here at all, . . . the Act doesn't [sic] violate the right to travel as defined by *Saenz*." *Id.* at 63a. The court also held that, because this Court held in *Torres* that "the right to travel permits the federal government to put new migrants to a state or territory on the same footing as that of long-established citizens," Petitioners moving to Alaska or Hawaii could not demonstrate interference with their right to travel where "all federal employees in Alaska and Hawaii are denied locality pay." *Id.* at 65a. Finally, the court rejected the Petitioners' argument that a higher level of scrutiny must apply to the unique discriminatory basis afforded under FEPCA based purely on the identity of the state in which one resides, finding that Petitioners had "abandoned" that claim, and because there is not otherwise a "free-floating requirement that all congressional action be rational." *Id.* at 66a.[4]

REASONS FOR GRANTING THE PETITION

I. THE PROTECTION AFFORDED TO FEDERAL CITIZENS BY THE CITIZENSHIP CLAUSE IS A FUNDAMENTAL RIGHT THAT MUST BE REAFFIRMED BY THIS COURT

Certiorari review of this case is necessary to resolve the fundamentally important question of whether Congress, without a compelling justification

---

[4] The court also concluded, however, that even if it were to construe Petitioners' briefing to have raised an equal protection claim, "the Act clearly satisfies rational-basis scrutiny for the reasons stated by the district court." *Id.* at 66a n.8. The Court of Appeals devoted no other analysis to this argument.

beyond rational basis, may single out the residents of two particular states and deny them benefits that are provided to residents of the other forty-eight states based on nothing more than the identity of the state in which they reside. The courts below found that the Petitioners' Constitutional rights were not implicated by such an action because FEPCA's exclusion did not discriminate against residents *within* any particular state. In other words, the courts held that, because no one in Hawaii or Alaska receives locality pay, the Act did not interfere with Petitioners' Constitutional right to travel among the states or to equal protection under the laws, *despite* a finding by the District Court that FEPCA's exclusion of Alaska and Hawaii residents penalized them for traveling to, and residing in, these states, and that Respondents had not articulated any reasonable basis for this exclusion. Unless this Court corrects this misapplication of the Constitution, Congress will be free to enact legislation that penalizes citizens of the United States for no apparent reason other than their decision to reside in a particular state. Such an outcome is fundamentally at odds with the concept of Federal citizenship, and eviscerates this Court's prior ruling that Congress is obligated to respect the Constitutional right to travel.

The flaw in the lower courts' reasoning arises first from the notion that a rational basis analysis is sufficient to determine whether Congressional discrimination based on state identity violates equal protection. Neither court considered whether the unique discriminatory basis on which Congress denies benefits under FEPCA justifies a higher level of scrutiny than that applied to other laws. The District Court analyzed the Government's purported justifications for the statute and found them lacking under any

analysis other than rational basis—and all but one rationale failed to even meet this standard—yet failed to consider that discrimination based on state residence should justify at least some form of intermediate scrutiny requiring Congress to at least provide a justification in its legislation singling out citizens for denial of benefits exclusively because of the state in which they reside.

Indeed, if the Ninth Circuit's refusal to apply meaningful Constitutional scrutiny to FEPCA is left undisturbed, Congress would be free to deny a host of Federal benefits to Federal citizens based *solely* on the identity of the state in which they resided. For instance, Congress could permit a tax credit for dependent children among forty-nine of the fifty states—even while expressly stating in the statute that the purpose of the credit was to assist families in providing for their children—but withhold, *without explanation*, such a credit from families residing in the state of Mississippi. Such a provision would clearly impact Federal citizens' decisions whether to move to or from Mississippi, and would penalize those who moved to, and resided in, that state. Moreover, this exclusion could have arisen from nothing more than political expediency—for instance, the need to cut Federal costs—and the Congressional representatives of the targeted state would be powerless to prevent the outcome. But under the Ninth Circuit's analysis, such an outcome would be constitutionally permissible, and the right to travel would not be implicated, because this was not a *state* statute, and because all Mississippi residents would be deprived of the tax credit regardless of how long they lived in the state. Surely, the Constitution cannot permit Congress to mete out the benefits of

Federal citizenship by drawing lines among the states in such a way.

The failure by Congress to provide locality pay to Federal employees solely because they reside in Alaska or Hawaii is inconsistent with our Federal structure as a union of fifty states and the concept of Federal citizenship of the United States. Just as this Court has held that individual states may not create subclasses of citizens within their boundaries and accord less favorable treatment to some subclasses than others, so the Federal government should not be able to create subclasses of Federal citizens simply based upon the states in which they reside. Because the Ninth Circuit's decision allows this very result, only this Court can provide the clarity necessary to avoid this outcome.

The lower courts' analysis also fails due to their rote application to a Federal statute of the three-part test in *Saenz*, which by its own terms involved a Constitutional challenge to a *state* law. The Ninth Circuit devoted little attention to this analysis, concluding simply that FEPCA's exclusion did not violate the right to travel as defined by *Saenz* because "the states have no role in determining the compensation of federal employees." App. 63a. This reasoning completely ignores that FEPCA's exclusion directly interferes with the Petitioners' right to travel, and ignores this Court's conclusion in *Saenz* that the Constitutional right to travel is protected against incursion from acts of Congress as well as the states.

II. FEPCA'S EXCLUSION OF FEDERAL CITIZENS FROM A SIGNIFICANT BENEFIT SOLELY BECAUSE THEY RESIDE IN A PARTICULAR STATE VIOLATES PETITIONERS' CONSTITUTIONAL RIGHT TO TRAVEL

The Ninth Circuit erred by mechanically applying the analysis used in *Saenz* to conclude that FEPCA's denial of locality pay to Federal employees residing in Alaska and Hawaii did not infringe upon Petitioners' Constitutional right to travel. At the outset, this Court has repeatedly emphasized the importance of the right of free interstate movement to the concept of the nation as a union of states. *See, e.g., Saenz*, 526 U.S. at 511 ("The Fourteenth Amendment, like the Constitution itself, was, as Justice Cardozo put it, 'framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division.'") (quoting *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935)); *see also Shapiro*, 294 U.S. at 629-30 ("This Court long ago recognized that the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement.") (quoting *Passenger Cases*, 7 How. 283, 293 (1849)); *id.* at 630 ("The constitutional right to travel from one State to another . . . occupies a position fundamental to the concept of our Federal Union . . . . [A] right so elementary was conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created.") (quoting *United States v. Guest*, 383 U.S. 745, 757-58 (1966)).

This Court has also unequivocally held that Congress may not offend the Constitutional right to travel in enacting Federal legislation, and the District Court in this case explicitly found that FEPCA's exclusion of Federal employees residing in Hawaii and Alaska influenced Petitioners' decisions to travel to and from the excluded states—a factual finding that the Respondents did not dispute. Notwithstanding the foregoing, the Circuit Court held that FEPCA's exclusion was not subject to strict scrutiny because: (1) such a finding would make it "quite hard" for Congress to "tax airports, hotels, moving companies or anything else involved in interstate movement" (App. 63a); (2) the "states aren't [sic] involved here at all, so the Act doesn't [sic] violate the right to travel as defined by *Saenz*" (*id.*); and (3) the exclusion was consistent with the Congressional action upheld against a right to travel challenge by this Court in *Califano v. Torres*, 435 U.S. 1 (1978). *Id.* at 65a. The court also held that the class of Petitioners who reside in Alaska and Hawaii lack standing to bring a right-to-travel claim. Each of these conclusions is erroneous.

The Ninth Circuit's concern that subjecting FEPCA's exclusion to strict scrutiny would jeopardize Congress's ability to tax airports, hotels or "anything else involved in interstate movement" is entirely misplaced. In *Evansville-Vanderburgh Airport Authority v. Delta Airlines*, 405 U.S. 707 (1972), *superceded by statute*, Airport Development Acceleration Act of 1973, Pub. L. No 93-44, 87 Stat. 90, *as recognized in Aloha Airlines v. Director of Taxation of Hawaii*, 464 U.S. 7, 9-10 (1983), this Court specifically rejected the argument that a tax imposed on interstate airline travelers unconstitutionally burdened their right to travel. Indeed, the Court held that

"[t]he principle that burdens on the right to travel are constitutional only if shown to be necessary to promote a compelling state interest *has no application* in this context" because the tax was designed to fund a facility that "aids rather than hinders the right to travel." *Id.* at 714 (emphasis added). By contrast, FEPCA's exclusion of Alaska and Hawaii residents could in no way be said to aid the right to travel. Accordingly, the Ninth Circuit's concern that subjecting FEPCA's exclusion to strict scrutiny would jeopardize Congress's ability to tax airports, airlines, hotels or other implements of interstate travel is unfounded.

The Ninth Circuit also erred by concluding that strict scrutiny was not appropriate merely because the states were not involved in enacting FEPCA. As noted, this conclusion contradicts the holding in *Saenz* that the Constitutional right to travel may not be infringed by either state or *federal* enactments. While the *Saenz* decision did set forth "three recognized components" of the right to travel as applied to the states, it never purported to provide an exhaustive or final list of the ways the right could be violated. *See Saenz*, 526 U.S. at 500 ("[t]he right to travel discussed in our cases embraces *at least* three different components") (emphasis added). It certainly cannot be said that the holding in *Saenz* precludes a finding that Congress violated Petitioners' right to travel merely because the states were not involved in enacting FEPCA.

The Ninth Circuit's conclusion that Petitioners' claim is foreclosed by this Court's decision in *Torres* is also incorrect. In *Torres*, *supra*, this Court, in a brief *per curiam* decision, rejected a constitutional challenge to a statute providing Supplemental Secu-

rity Income ("SSI") benefits to residents of the United States, but not to residents of the territory of Puerto Rico. The *Torres* decision, however, does not defeat the Petitioners' arguments that the FEPCA exclusion offends their Constitutional rights, for the simple reason that the decision dealt with Congressional treatment of Puerto Rico and not one of the fifty states. As the Court noted in *Torres*, "Congress has the power to treat Puerto Rico differently" since "Puerto Rico has a relationship to the United States 'that has no parallel in our history.'" *Torres*, 435 U.S. at 3 n.4 (quoting *Examining Board v. Flores de Otero*, 426 U.S. 572, 596 (1976)). Moreover, neither Puerto Rico nor its residents have the same constitutional rights as States and State residents. *See Harris v. Rosario*, 446 U.S. 651, 651 (1980) ("Congress, which is empowered under the Territory Clause of the Constitution, U.S. Const. Art. IV, §3, cl. 2, to 'make all needful Rules and Regulations respecting the Territory . . . belonging to the United States,' may treat Puerto Rico differently from States so long as there is a rational basis for its actions."). Insofar as Puerto Rico occupies a legal status materially different from that of a State, the Court's rejection of a Constitutional challenge in *Torres* does not compel that the same conclusion be reached in this case.

Finally, the Ninth Circuit erred by concluding that Federal employees who now reside in Alaska and Hawaii lack standing to bring a right-to-travel claim. The court based its conclusion upon its finding that the Act does not affect these Petitioners' "freedom to leave" Alaska or Hawaii, but instead penalizes them for remaining in their home state. This holding is inconsistent with this Court's rulings in cases addressing the Constitutional right to travel, and has the perverse effect of denying those who are most

severely punished by an unconstitutional law the standing to challenge the law on constitutional grounds.

For instance, in *Soto-Lopez*, *supra*, the plaintiffs successfully challenged a New York statute that granted preference in civil service employment opportunities to veterans who were residents of New York when they entered the service. As with the class of Petitioners who currently reside in Alaska and Hawaii, the plaintiffs in *Soto-Lopez* were long-time residents of the state in which they suffered the deprivation, and the statute they challenged did not affect their "freedom to leave" their home state. This Court nevertheless found in favor of their right-to-travel claim because the challenged statute penalized them for the timing of their migration to New York. *Soto-Lopez*, 476 U.S. at 911.

Similarly, the *Saenz* case was brought by three individuals who had recently moved to California and alleged that they were penalized by that state's law that denied benefits to recent migrants to the state. As with the Petitioners who reside in Alaska and Hawaii, none of the plaintiffs in *Saenz* could allege that the challenged statute affected their "freedom to leave" their home state, but they clearly had standing to challenge the statute simply by demonstrating that they were harmed by its application. It would be an odd outcome indeed if those who are most severely punished by an unconstitutional statute—in this case, the residents of the states specifically excluded from the Federal benefit—were denied standing to challenge the statute merely because it did not hinder them from leaving their home state in order to escape its adverse, and unconstitutional, impact.

Based upon the foregoing, Petitioners respectfully submit that FEPCA's exclusion of Federal employees from receiving locality pay solely because they reside in Alaska and Hawaii must be subject to strict scrutiny pursuant to this Court's decision in *Saenz*. Absent a ruling by this Court that Congressional enactments burdening the right to travel are subject to meaningful Constitutional scrutiny, Congress will be free to enact future legislation that penalizes Federal citizens solely because they choose to reside in a particular state.

III. FEPCA'S EXCLUSION OF FEDERAL EMPLOYEES FROM A SIGNIFICANT BENEFIT SOLELY BECAUSE THEY RESIDE IN PARTICULAR STATES VIOLATES PETITIONERS' CONSTITUTIONAL RIGHT TO EQUAL PROTECTION UNDER THE LAWS

Even if the Ninth Circuit did not err by concluding that FEPCA is not subject to strict scrutiny by virtue of a right-to-travel analysis, its failure to apply any meaningful review of FEPCA's exclusion under the Equal Protection Clause demands the attention of this Court. In their Complaint, the Petitioners alleged that FEPCA's exclusion of Federal employees living in Alaska and Hawaii violated their right to equal protection under the Fifth Amendment to the United States Constitution, and the District Court found that Petitioners had demonstrated that FEPCA triggered equal protection review, albeit under a rational basis standard. Moreover, in their appeal to the Ninth Circuit, Petitioners explicitly challenged the District Court's application of the rational basis test to their claims, and argued in their briefs that the statute offended the Equal Protection

clause, requiring a higher level of scrutiny than rational basis. *See, e.g.*, Brief of Appellants at 22 ("Consequently, just as the Privileges and Immunities Clause of the Fourteenth Amendment and the Equal Protection Clause, through the well-established constitutional right to travel, forbid States from creating disfavored subclasses of State citizens based on length of residency, so does it forbid the Federal government from distinguishing among subclasses of Federal citizens based on the State in which they reside and treating some of those citizens less favorably than others."); *see also* Reply Brief of Appellants at 2 ("As the employees demonstrated in their opening brief, the federal government has an obligation of equal protection that extends throughout all 50 states.").

Notwithstanding the foregoing, the Ninth Circuit inexplicably concluded that the Petitioners had abandoned this claim, and therefore refused to consider any of the Petitioners' arguments that the FEPCA exclusion would not survive rational basis scrutiny. App. 66a n.8 (holding that the Petitioners "don't [sic] claim that the Act's classification of employees based on the state in which they work is itself a denial of equal protection; they only claim this classification impermissibly burdens their right to travel," and that a "claim based on the right to travel is distinct from an equal protection claim."). The Ninth Circuit devoted a single sentence, with no supporting analysis, to rejecting the Petitioners' argument that the District Court erred as a matter of law in concluding that Respondents had satisfied the rational basis test, notwithstanding the fact that the District Court had rejected each of the Respondent's purported rationales for the exclusion of Federal employees residing in Alaska and Hawaii.

The Circuit Court erred by concluding that the Act "clearly satisfies rational-basis scrutiny for the reasons stated by the district court." *Id.* The District Court admitted that it was "puzzled by the legislative anomaly that here operates to the life-long disadvantage of federal employees in" Alaska and Hawaii, and found none of the Government's proffered rationales for that anomaly persuasive. *Id.* at 52a. The court nevertheless sustained the statute under an extremely deferential minimum rationality standard, believing it was obligated to uphold the exclusion "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Id.* at 54a (quoting *Heller v. Doe*, 509 U.S. 312, 320 (1993)). In addition, the District Court erroneously placed upon the Petitioners the impossible burden of proving that no such conceivable state of facts could exist. *Id.* at 56a.

The Ninth Circuit's affirmation of these conclusions was plainly wrong. In cases where this Court has applied a rational basis test to residency-based statutes, it has imposed a test that is far less deferential to the test fashioned by the District Court. For instance, in *Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985), this Court struck down a New Mexico statute awarding tax benefits based on residency at a particular past point in time under a minimum rationality test, because the purported purpose—encouraging veterans to move to the state—bore no rational relationship to the distinctions drawn by the statute, which implemented a cut-off date for entitlement to benefits that had already passed. *Id.* at 618-23. Similarly, in *Zobel*, this Court struck down a statute awarding benefits derived from mineral income dividends based on the duration of residency because "Alaska has shown no valid state

interests which are rationally served by the distinction it makes." *Zobel*, 457 U.S. at 60-65.

When the standard of review of *Hooper* and *Zobel* is properly applied, it is clear that the lower court's application of the rational basis test was in error. After rejecting the Respondents' purported rationale for the exclusion, the District Court held that Congress could have decided employees who receive COLA pay allowances did not also need to receive locality pay, and that Congress may have determined that locality pay was not needed in Alaska and Hawaii to recruit and retain employees. These findings, however, are squarely inconsistent with Congress's declared reason for providing locality pay: to ensure public-private wage equity. 5 U.S.C. §5301. Where Congress has declared its purpose, it is irrational to suggest that Federal employees in Alaska and Hawaii were excluded from locality pay because they received COLA allowances to address the cost of living in those States. As noted by the District Court itself, these two pay supplements "are aimed at remedying different compensation issues, and are calculated differently as well." App. 53a.

The Ninth Circuit's cursory affirmation of this reasoning ignores this Court's holdings in *Bernalillo* and *Zobel*. Indeed, in *Zobel*, this Court struck down the statute at issue because its classifications were not rationally related to its declared purpose. *Zobel*, 457 U.S. at 61-62. As the Court explained in *Zobel*, where the purposes of a statute are expressly stated, "we need not speculate as to the objectives of the legislature." *Id.* at 61 n.7. Because FEPCA's exclusion of Federal employees residing in Alaska and Hawaii does not survive even rational basis scrutiny,

the Ninth Circuit's ruling to the contrary should be reversed.

CONCLUSION

By failing to subject the exclusion of Federal employees who reside in Alaska and Hawaii to any meaningful scrutiny—much less the strict scrutiny that is appropriate for statutes interfering with the Constitutional right to travel—the lower courts' decisions in this case leave open a glaring hole in the Constitutional protection that gives meaning to Federal citizenship. If the Ninth Circuit's decision is left unaddressed, Congress will be free to enact legislation that excludes certain Federal citizens from important Federal benefits or privileges *for no reason* other than the fact that they reside in a particular state. Certiorari review should be granted to prevent such an outcome.

Respectfully submitted,

GREGORY K. MCGILLIVARY
Counsel of Record
WOODLEY & MCGILLIVARY
1101 Vermont Avenue, NW
Suite 1000
Washington, DC 20005
(202) 833-8855

February 9, 2010